

DOCUMENT RESUME

08122 - [C3388458]

[Protest Alleging Procurement Was Not Competitive and Preferential Treatment to Awardees]. B-192668. November 29, 1978. 6 pp.

Decision re: Die Nash Corp.; by Milton J. Socolar, General Counsel.

**Contact: Office of the General Counsel; Procurement Law I.
Organization Concerned: Department of Energy; Jet Propulsion
Lab., Pasadena, CA; National Aeronautics and Space
Administration.**

**Authority: 4 C.F.R. 20. 54 Comp. Gen. 767. 54 Comp. Gen. 97. 54
Comp. Gen. 111. 56 Comp. Gen. 730. 55 Comp. Gen. 374.
B-189551 (1978). B-178752 (1974). E-197200 (1976). B-189516
(1977). B-183190 (1975). B-190638 (1977). B-186502 (1976).
B-187286 (1976). B-184852 (1975). B-188751 (1977). E-191825
(1978).**

A protester against a contract award alleged that the procurement was not open and that there was preferential treatment by the Government. The protest involving apparent improprieties in the solicitation filed after the award and the protest involving preferential treatment not filed within 10 days were untimely. The protester was not an interested party since it did not protest the terms of the solicitation on a timely basis nor submit a proposal. Since the protest was not for consideration, no useful purpose would have been served by holding a bid protest conference. (HFW)

DECISION



G. Gallagher
THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548
8458

FILE: B-192668

DATE: November 29, 1978

MATTER OF: Die Mesh Corporation

DIGEST:

1. Protest after award that terms of request for proposals (RFP) did not permit open competition is untimely. Under GAO Bid Protest Procedures, protests based on apparent improprieties in RFP must be filed before closing date for receipt of proposals.
2. Protest that, regardless of terms of RFP, preferential treatment previously given other firms precluded fair consideration of any proposal protester might submit is untimely. Protester knew basis for protest when it received RFP, and did not file protest within 10 working days thereafter as required by GAO Bid Protest Procedures.
3. Prospective offeror which did not timely protest terms of RFP and chose not to submit proposal is not "interested party" to protest later that awardees received preferential treatment from Government. Class of parties eligible to protest alleged preferential treatment consists essentially of disappointed offerors. No such parties have protested or indicated that protester is authorized to protest on their behalf.
4. Where merits of protest are not for consideration because some issues are untimely and protester is not interested party to raise others, no useful purpose would be served by holding bid protest conference.

Die Mesh Corporation has protested the awards of contracts for the design of electric and hybrid passenger vehicles to four companies. The protester alleges essentially that (1) the procurement was not

open because all interested parties were not given an opportunity to submit proposals, and (2) there was preferential treatment by the Government in that several of the contractors have previously received electric vehicle contracts; one of the contractors lacks adequate facilities and some of its principals were previously associated with another company which received an electric vehicle design study contract; and another of the contractors is a foreign company, and should not be receiving U.S. taxpayers' dollars.

While Die Mesh repeatedly complains of various actions by the Department of Energy, the procurement was actually conducted by the California Institute of Technology's Jet Propulsion Laboratory under a prime contract (No. NASA 7-100) with the National Aeronautics and Space Administration (NASA). The relief requested is that the project be stopped and a thorough investigation conducted.

In its September 18, 1978, report to our Office, NASA asserts that Die Mesh is not an interested party to protest, and that this subcontract protest is not for consideration in any event under the standards enunciated in Optimum Systems, Inc., 34 Comp. Gen. 767 (1975), 75-1 CPD 166, where our Office stated that we would review subcontract protests only in certain limited circumstances. Also, NASA questions the timeliness of the protest.

As for the protester's first argument, NASA points out that the procurement was synopsisized in the Commerce Business Daily on October 25, 1977, that by letters of October 28, 1977, 342 organizations and individuals were invited to a presolicitation conference, and that 177 copies of the request for proposals (RFP) were issued on January 31, 1978. In this regard, Die Mesh has stated that it was perfectly capable of submitting a proposal under the RFP, but believed that it would have been futile to do so in light of the preferential treatment given to certain companies in previous procurements.

If the protester's argument is that the terms of the RFP did not permit full and free competition, or precluded Die Mesh from competing, it is untimely, because under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), protests based upon apparent improprieties in an RFP must be filed prior to the closing date for receipt of proposals. If the protester's argument is that regardless of the terms of the RFP, any proposal it submitted would not receive fair consideration in light of the preferential treatment previously given other firms, it is again untimely, because Die Mesh knew this basis for protest when it received the RFP, and protests other than those based upon solicitation improprieties must be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. Section 20.2(b)(2), Bid Protest Procedures.

As for the allegation that the successful offerors received preferential treatment, NASA points out that by choosing not to submit a proposal, Die Mesh effectively removed itself as an interested party to protest these issues, because even assuming that preferential treatment occurred, the protester could not have been hurt by it. Die Mesh responds that it has an interest in the procurement because it has been "intricately involved" in electric vehicle development for a number of years and was a vocal proponent of the Electric and Hybrid Vehicle Research, Development and Demonstration Act.

We have stated that to protest the award of a Government contract is "a serious matter." Cessna Aircraft Company et al., 54 Comp. Gen. 97, 111 (1974), 74-2 CPD 91. Protests often delay the Government's procurement of necessary goods and services, and sometimes have a very substantial economic impact not only on the protester but also on other involved parties. We therefore believe, as indicated in section 20.1(a) of our Bid Protest Procedures, that a party must be "interested" in order to have its

protest considered by our Office. Determining whether a particular party is sufficiently interested involves consideration of the party's status in relation to the procurement (e.g., prospective bidder or offeror; bidder or offeror eligible for award; bidder or offeror not eligible for award; nonbidder or nonofferor; and the nature of the issues raised. See, generally, American Satellite Corporation, B-189551, April 17, 1978, 78-1 CPD 289.

Where the issues raised in a protest involve which of several competing bidders or offerors should properly have received the award, we believe that, in general, a party which would not be eligible for award in any event is not sufficiently interested to protest. See, for example, Kleen-Rite Janitorial Service, Inc., B-178752, March 21, 1974, 74-1 CPD 139 (company which is not eligible 8(a) firm is not interested party to protest amount of contracts let to specific 8(a) firm); DoAll Iowa Company, B-197200, September 23, 1976, 76-2 CPD 276 (large business protesting agency's determination that awardee under total small business set-aside has capacity to perform contract); Elec-Trol, Inc., 56 Comp. Gen. 730 (1977), 77-1 CPD 441 (nonbidding party, with mere expectation of receiving subcontract award, protesting evaluation of bids on prime contract); Comspace Corporation, B-189516, October 17, 1977, 77-2 CPD 296 (suspended firm alleging Government negotiated with it in bad faith and protesting awards to another offeror); and American Satellite Corporation, *supra* (prospective subcontractor protesting that there was insufficient competition for prime contract award).

In some instances, a nonbidding entity has been considered sufficiently interested to protest concerning which bidder or offeror should properly have received the award. Many of these cases involve some type of organization which, although not a competitor for the contract, arguably has a substantial

economic interest in the outcome of the procurement. For example, a parents' association was held to be an interested party to protest the award of a contract for operation of a day care center where its members' fees accounted for approximately 15 percent of the total operation cost of the center, and nearly one-third of the contract price. Department of Labor Day Care Parents Association, B-183190, June 10, 1975, 75-1 CPD 353. As pointed out in that decision, other such cases have involved labor unions and civic and trade associations. Also, as noted in Elec-Trol, supra, in some instances a subcontractor may be sufficiently interested to protest a prime contract award.

However, it is not enough merely to be an individual employee of a disappointed bidder or offeror (Dale Chlouber, B-190638, December 20, 1977, 77-2 CPD 484), two concerned taxpayers (A. Kenneth Bernier and C.J. Willis, B-186502, July 19, 1976, 76-2 CPD 56), a concerned citizen (Patti R. Whiting, B-187286, September 29, 1976, 76-2 CPD 298), a consultant who is concerned about Government procurement matters but does not represent any participant in the protested procurement (Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242), or a former Government purchasing agent concerned about whether adequate supplies will be furnished to the Government under the protested contract (Barbara L. Bayliss, B-188751, July 6, 1977, 77-2 CPD 8).

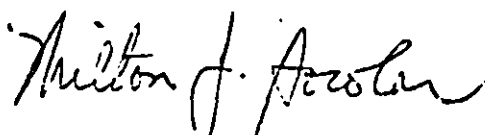
In the present case, the protester states it is concerned about electric vehicle development but chose not to submit a proposal in this procurement. It is evident that the direct and substantial economic interests at stake are not those of Die Mesh, but rather those of offerors which participated in the procurement and did not receive awards. As indicated in American Satellite Corporation, supra, Die Mesh's interests are too remote for it to be considered an interested party because there are other intervening parties with more direct and substantial interests. Stated another way, we

believe the interests involved in the procurement are adequately protected by limiting the class of parties eligible to protest to disappointed offerors (and, possibly, specially interested organizations or subcontractors). No such parties have protested, nor is there any indication that they have authorized Die Mesh to protest on their behalf.

In its August 16, 1978, letter of protest, Die Mesh requested a "full and open hearing." In this regard, the conferences held pursuant to section 20.7 of our Bid Protest Procedures are informal meetings; our Office does not conduct formal hearings in bid protest cases. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374, 387-388 (1975), 75-2 CPD 232. The merits of the present protest are not for consideration, and we believe no useful purpose would be served by holding a conference in this case. See Rushton Industrial Construction, B-191825, June 12, 1978, 78-1 CPD 427.

In view of the foregoing, it is unnecessary to decide whether this subcontract protest is properly for consideration under the criteria of Optimum Systems, supra.

The protest is dismissed.



Milton J. Socolar
General Counsel